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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
9

10 DANIEL W. GOLDEN,  
11 Plaintiff,  
12 v.  
13 JPMORGAN CHASE BANK, N.A.,  
14 its successors and/or assigns;  
15 AMERICAN MORTGAGE  
16 NETWORK, INC., its successors  
17 and/or assigns; U.S. BANK  
18 NATIONAL ASSOCIATION, as  
19 Trustee for J.P. Morgan Mortgage  
20 Trust 2007-S2; and SELECT  
21 PORTFOLIO SERVICING, INC.,  
22 Defendants.

Case No.: 16-cv-1209-BTM(JMA)

**ORDER GRANTING MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT AND DENYING  
MOTION TO STRIKE AS MOOT**

**[ECF NOS. 35, 36]**

22 Defendants U.S. Bank National Association (“U.S. Bank”), as trustee for the  
23 JPMorgan Mortgage Trust 2007-S2 and Select Portfolio Servicing Inc. (“SPS”)  
24 have filed a motion to dismiss Plaintiff’s First Amended Complaint (“FAC”) as well  
25 as a motion to strike portions of the FAC. (ECF Nos. 35, 36.) Defendant JPMorgan  
26 Chase Bank, N.A. (“JPMorgan Chase”) has joined the motion to dismiss. (ECF  
27 No. 37.) For the reasons discussed below, the Court will grant Defendants’ motion  
28 to dismiss and deny their motion to strike as moot.

1 **I. BACKGROUND**

2 Plaintiff Daniel W. Golden, who is proceeding pro se, filed this foreclosure  
3 relief action on May 19, 2016. His original complaint stated eight claims under  
4 federal and California state law, and named two defendants, JPMorgan Chase and  
5 American Mortgage Network, Inc. ("AMN"). (ECF No. 1.) Default was entered as  
6 to JPMorgan Chase on August 3, 2016,<sup>1</sup> and as to AMN on September 6, 2016.  
7 (ECF Nos. 11, 15, 16.) On January 11, 2017, the Court granted JPMorgan Chase's  
8 motion to set aside the default. (ECF No. 22.)

9 On February 17, 2017, Plaintiff filed a First Amended Complaint ("FAC")  
10 naming AMN, JPMorgan Chase, U.S. Bank, and SPS as defendants. (ECF No.  
11 28.) Plaintiff alleges that on February 15, 2007, he executed a promissory note  
12 ("Note") in the amount of \$1,000,000.00 secured by a deed of trust ("DOT") on real  
13 property located at 21360 Crestwind Drive, San Marcos, CA 92078 (the  
14 "property"). FAC at 2, 7. The DOT identifies AMN as the lender, First American  
15 Title Insurance Company as trustee, and names Mortgage Electronic Registration  
16 Systems, Inc. ("MERS"), as beneficiary and AMN's nominee. FAC Ex. A.

17 Plaintiff alleges Defendants and other unknown entities were involved in an  
18 attempt to securitize his loan into the JPMorgan Mortgage 2007-S2 Trust (the  
19 "2007-S2 Trust"). FAC at 8, 10. On September 5, 2012, a Corporate Assignment  
20 of Deed of Trust was executed, pursuant to which MERS, as nominee for AMN,  
21 assigned all beneficial interest in the DOT to U.S. Bank as trustee of the 2007-S2  
22 Trust. FAC Ex. C. Plaintiff alleges the pooling and service agreement ("PSA")  
23 applicable to the 2007-S2 Trust required loans to be assigned or transferred to the  
24 trust no later than the trust closing date of May 30, 2007, and that the assignment  
25 of the DOT was not effective because it took place after the closing date of the  
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27 <sup>1</sup> The August 3rd default should have been entered as to Chase only, but was inadvertently entered as to both  
28 Chase and AMN. The Court therefore set aside the August 3rd entry of default as to AMN. The clerk properly  
entered AMN's default on September 6th. (ECF Nos. 11, 15.)

1 2007-S2 Trust. FAC at 9-10. He also alleges that U.S. Bank violated the PSA by  
2 failing to deposit endorsed promissory notes, the original DOT, and an assignment  
3 of the Note with the custodian of records of the 2007-S2 Trust. Id. at 10.

4 Plaintiff further contends that under California law, the note and mortgage  
5 are inseparable, and that while assignment of the note “carries the mortgage with  
6 it” assignment of a deed of trust alone is a “nullity.” Plaintiff alleges he reviewed  
7 records of the San Diego County Recorder’s Office and found no evidence of a  
8 recorded “Assignment of Note,” and concludes from this that his Note was never  
9 assigned to U.S. Bank. FAC at 11. He alleges that in light of the foregoing  
10 California authority against “splitting” the mortgage from its security interest, the  
11 fact that only the DOT, but not the Note, was assigned to U.S. Bank is an additional  
12 defect that renders the assignment of the DOT to U.S. Bank invalid. Id.  
13 Alternatively, he alleges the Note was transferred to U.S. Bank, but the transfer  
14 occurred after the closing date of the 2007-S2 Trust and was therefore ineffective.  
15 See id.

16 Plaintiff acknowledges that in 2013, he “suffered a financial hardship which  
17 caused him to fall behind in his mortgage payments.” FAC at 8. He attempted to  
18 negotiate a loan modification with Chase, then the servicer of his loan, but a  
19 modification was never approved. Id. at 9. On September 13, 2013, he received  
20 notice that the servicing of his loan was being transferred to SPS as of October 1,  
21 2013. Id. at 12 & Ex. E. He thereafter tried to make payments to SPS, but SPS  
22 refused to accept them. Id. at 9.

23 Plaintiff alleges that “[s]ince 2014” he sent SPS several letters in an effort to  
24 discover the beneficiary of his debt obligation, and was repeatedly told the  
25 beneficiary was U.S. Bank. FAC at 12. He alleges the lack of a recorded  
26 Assignment of Note casts doubt on the veracity of this response. Id.

27 On October 11, 2014, a Substitution of Trustee was executed by SPS as  
28 servicing agent and attorney-in-fact of U.S. Bank, naming The Wolf Law Firm as

1 trustee under the DOT. FAC Ex. D. Plaintiff alleges this substitution was invalid  
2 because it was signed by SPS rather than U.S. Bank. FAC at 12. He also claims  
3 the underlying defects in the assignment of the DOT to U.S. Bank rendered U.S.  
4 Bank incapable of substituting The Wolf Law Firm as trustee. Id.

5 On July 10, 2015, The Wolf Law Firm conducted a foreclosure sale, and JP  
6 Morgan Chase purchased the property. FAC Ex. F. Plaintiff alleges the  
7 foreclosure sale was invalid since The Wolf Law Firm “was not the proper and legal  
8 trustee ... due to the invalid Substitution of Trustee.” Id. at 13. He also alleges  
9 that since the transfer of the DOT to U.S. Bank as trustee of the 2007-S2 Trust  
10 was invalid, all payments he made on his loan during the time it was purportedly  
11 part of the 2007-S2 Trust must be disgorged, and the wrongful foreclosure must  
12 be reversed. Id.

13 Plaintiff states claims for declaratory relief pursuant to 28 U.S.C. §§ 2201,  
14 2202, wrongful foreclosure, violation of 15 U.S.C. § 1692e (the Fair Credit  
15 Reporting Act), violation of 15 U.S.C. § 1641(g) (the Truth in Lending Act), quasi  
16 contract, negligence, violation of California Business & Professions Code § 17200,  
17 quiet title, breach of contract, breach of the implied covenant of good faith and fair  
18 dealing, accounting, and violation of the California Homeowners’ Bill of Rights, Civil  
19 Code §§ 2924.27 and 2924(a)(6). He seeks general and special damages,  
20 punitive damages, as well as injunctive and declaratory relief.

21 On April 5, 2017, U.S. Bank and SPS filed motions to dismiss the FAC in its  
22 entirety and to strike the FAC’s prayer for punitive damages. The same day,  
23 JPMorgan Chase filed a notice of joinder to the motion to dismiss. Plaintiff has not  
24 opposed the motions.

## 25 **II. LEGAL STANDARD**

26 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)  
27 tests the legal sufficiency of the complaint. Fed. R. Civ. P. 12(b)(6). Only a  
28 complaint that states a “claim to relief that is plausible on its face” will survive a

1 Rule 12(b)(6) motion to dismiss. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).  
2 Although detailed allegations are not required, the complaint's factual allegations  
3 "must be enough to raise a right of relief above the speculative level." Bell Atlantic  
4 v. Twombly, 550 U.S. 544, 555 (2007). "[W]here the well-pleaded facts do not  
5 permit the court to infer more than the mere possibility of misconduct, the complaint  
6 has alleged- but it has not 'show[n]'—'that the pleader is entitled to relief.'" Iqbal,  
7 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

8 When reviewing a motion to dismiss, the complaint's allegations of material  
9 fact are taken as true and construed in the light most favorable to plaintiff. Parks  
10 Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). A pro se  
11 plaintiff's pleadings are liberally construed when evaluated under the standards of  
12 Twombly and Iqbal. Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010). In ruling  
13 on a motion to dismiss, the court may consider exhibits incorporated by reference  
14 in the complaint, and matters subject to judicial notice, without converting the Rule  
15 12(b)(6) motion into a motion for summary judgment. Lee v. City of Los Angeles,  
16 250 F.3d 668, 688-89 (9th Cir. 2001).

17 As a general rule, leave to amend a complaint which has been dismissed  
18 should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be  
19 denied when "the court determines that the allegation of other facts consistent with  
20 the challenged pleading could not possibly cure the deficiency." Schreiber Distrib.  
21 Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1401 (9th Cir. 1986).

22 Under this District's Local Rules, failure to file an opposition to a motion "may  
23 constitute consent to the granting of a motion...." CivLR 7.1.f.3.c. However, even  
24 when a motion is unopposed, the Court reviews it on the merits to determine  
25 whether there is good cause to grant it. Fry v. Wachovia Mortg. FSB, No.  
26 09cv2662-L(NLS), 2010 U.S. Dist. LEXIS 95634, at \*2 (S.D. Cal. Sept. 13, 2010).

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### 1    **III.    REQUEST FOR JUDICIAL NOTICE**

2            In connection with their motion, Defendants have filed a request for judicial  
3 notice (“RJN”) of 16 documents. See RJN (ECF No. 35-3), Exs. A-P. The RJN is  
4 unopposed.

5            Pursuant to Federal Rule of Evidence 201, a court may take judicial notice  
6 of matters of public record as well as documents incorporated by reference into  
7 the complaint. Lee, 250 F.3d at 689. The Court may take judicial notice of the  
8 contents of documents incorporated by reference into the complaint. Coto  
9 Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010). However, the scope  
10 of judicial notice of other documents extends only to the existence of the  
11 documents, and not to any disputed facts they contain. Id.

12            Here, the Court grants the RJN as to Exhibit C (Corporate Assignment of  
13 Deed of Trust), which is already incorporated as an exhibit to the FAC. See FAC  
14 Ex. C. The Court also grants the request as to Exhibits D (Notice of Default and  
15 Election to Sell Under Deed of Trust) and E (Notice of Trustee’s Sale), both which  
16 are public records filed with the San Diego County Recorder’s Office.

17            Exhibits A and B are copies of quitclaim deeds. The first is dated February  
18 14, 2007, and purports to quitclaim to “Daniel W. Golden, an unmarried man,” all  
19 interest in the property held by “Daniel W. Golden, trustee of the Daniel W. Golden  
20 living Trust.” RJN Ex. A. The second is also dated February 14, 2007, except that  
21 it purports to quitclaim to “Daniel W. Golden, trustee of the Daniel W. Golden living  
22 Trust,” all interest in the property held by “Daniel W. Golden, an unmarried man.”  
23 RJN Ex. B. Both documents were recorded with the San Diego County Recorder’s  
24 Office and are matters of public record. The Court grants the RJN as to Exhibits  
25 A and B.

26            Exhibits F and G are copies of grant deeds that Plaintiff apparently recorded  
27 with the San Diego County Recorder’s Office after the foreclosure on the property.  
28 See RJN Ex. F (grant deed recorded July 21, 2015, reflecting a transfer of the

1 property by “Daniel W. Golden” to himself, Rosario M. Ulloa, and Jorge  
2 Hernandez); RJN Ex. G (grant deed recorded February 17, 2016, in which “Daniel  
3 W. Golden” purports to grant the property to Robert W. Sedlar). Exhibits H through  
4 J are copies of documents relating to an unlawful detainer action that JP Morgan  
5 Chase brought against Plaintiff. See RJN Ex. H (docket from action captioned JP  
6 Morgan Chase Bank NA v. Golden, San Diego Superior Court Case No. 37-2015-  
7 32812-CL-UD-NC,); Ex. I (complaint); Ex. J (writ of possession of real property).  
8 Exhibits K through P are copies of documents relating to various bankruptcy  
9 matters involving Plaintiff. See RJN Ex. K (docket in matter captioned In re Daniel  
10 Golden, U.S. Bankr. Ct., C.D. Cal., Case No. 2:15-bk-15112-BK), Ex. L (order of  
11 dismissal filed in the same case), Ex. M (involuntary Chapter 7 bankruptcy petition  
12 filed in In re Daniel Golden, U.S. Bankr. Ct., C.D. Cal., Case No. 2:16-bk-11153-  
13 BR), Ex. N (order of dismissal filed in the same case), Ex. O (docket from  
14 bankruptcy matter captioned In re Daniel Golden, U.S. Bankr. Ct., S.D. Cal., Case  
15 No. 16-00783-LA13), Ex. P (order of dismissal filed in same case). As the Court  
16 does not rely on Exhibits F through P in ruling on Defendants’ motion, it denies  
17 Defendants’ RJN as to those exhibits as moot.

#### 18 **IV. DISCUSSION**

19 Defendants advance a number of arguments in favor of their contention that  
20 the FAC fails to state a plausible claim for relief. The Court agrees and will grant  
21 the motion to dismiss under Rule 12(b)(6).<sup>2</sup>

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24 <sup>2</sup> In addition to moving under Rule 12(b)(6), Defendants also seek dismissal of the FAC for failure to join an  
25 indispensable party under Rule 12(b)(7). Their argument is based on RJN Exhibit B, in which Plaintiff apparently  
26 quitclaimed his interest in the property to “Daniel W. Golden, trustee of the Daniel W. Golden living Trust” on  
27 February 14, 2007. RJN Ex. B. Defendants argue that the Daniel W. Golden living Trust is an indispensable party  
28 to this action, since it holds title to the property, and that its absence warrants dismissal. A similar argument was  
rejected by the district court in a foreclosure action presenting similar facts. See Aguirre v. Cal-Western  
Reconveyance Corp., No. CV 11-6911 CAS (AGRx), 2012 WL 273753, at \*4 (C.D. Cal. Jan. 30, 2012) (holding an  
individual plaintiff had standing to proceed with a foreclosure relief action, although defendants argued he had  
transferred the property to a trust and thus “no longer owned the property,” because he was trustee of the trust and  
thus was a real party in interest “with standing to sue and defend on the trust’s behalf”). Since the Court dismisses  
the FAC under Rule 12(b)(6), it need not and does not reach the merits of Defendants’ motion under Rule 12(b)(7).

1           A. First Cause of Action for Declaratory Relief and Second Cause of Action  
2           for Wrongful Foreclosure

3           Plaintiff's first cause of action for declaratory relief is based on the contention  
4 that the foreclosure was invalid due to alleged defects in the securitization of the  
5 loan, assignment of the DOT, and substitution of trustee. Plaintiff seeks a judicial  
6 declaration that as a result of these defects, neither Chase nor U.S. Bank acquired  
7 an enforceable interest in the property. FAC ¶¶ 1-6. His second cause of action  
8 for wrongful foreclosure similarly relies on the claim that the foreclosure was invalid  
9 because it was based on "fraudulent foreclosure documents." Id. ¶¶ 7-12.

10          Both causes of action fail because they rely on flawed theories regarding  
11 alleged defects in the transfers of interest that led to the foreclosure. First, Plaintiff  
12 contends that the assignment of the DOT to U.S. Bank violated the terms of the  
13 PSA for the 2007-S2 Trust, including because it occurred on September 5, 2012,  
14 after the closing date of May 30, 2007, and because U.S. Bank allegedly failed to  
15 deposit the endorsed promissory note, original DOT, and an assignment of the  
16 Note with the trust's custodian of records. In Yvanova v. New Century Mortg.  
17 Corp., 62 Cal. 4th 919 (2016), the California Supreme Court held that borrowers  
18 challenging an assignment of interest to the foreclosing entity lack standing to raise  
19 issues that would render the assignment voidable, but may assert challenges that,  
20 if successful, would render the assignment void. 62 Cal. 4th at 939, 942-43. Post-  
21 Yvanova, courts have held that challenges based on alleged defects in  
22 securitization of a loan to a pooled trust, including allegations that the transfers  
23 violated the terms of applicable pooling and service agreements, are voidable  
24 defects. In re Turner, 859 F.3d 1145, 1149 (9th Cir. 2017). Accordingly, Plaintiff  
25 lacks standing to challenge the assignment of the DOT to U.S. Bank on the ground  
26 it violated the PSA for the 2007-S2 Trust.

27          Next, Plaintiff alleges that the assignment of the DOT to U.S. Bank was  
28 invalid because it was accomplished without a corresponding assignment of the



1 Note to U.S. Bank. Even assuming that Plaintiff's contention is correct and  
2 unilateral assignment of the DOT without the Note is a defect that voids the  
3 assignment of the DOT, Plaintiff's theory is implausible. His contention that the  
4 Note was never transferred to U.S. Bank is based on the lack of a recorded  
5 Assignment of Note in the San Diego County Recorder's Office. As Defendants  
6 point out, however, assignments of loans are commonly not recorded, and courts  
7 have rejected challenges to foreclosures based on the alleged absence of a  
8 recorded assignment of the note. Fontenot v. Wells Fargo Bank, N.A., 198 Cal.  
9 App. 4th 256, 272 (2011) (disapproved on other grounds by Yvanova, 62 Cal.4th  
10 at 937) (affirming trial court order sustaining demurrer where Plaintiff alleged an  
11 assignment of a DOT was made without corresponding assignment of the note,  
12 because "[p]laintiff rests her argument on the documents in the public record, but  
13 assignments of debt, as opposed to assignments of the security interest incident  
14 to the debt, are commonly not recorded"); Parcray v. Shea Mortg., Inc., No. CV-F-  
15 09-1942 OWW/GSA, 2010 WL 1659369, \*11 (E.D. Cal., Apr. 23, 2010) (rejecting  
16 Plaintiff's claim that the foreclosure sale was void because "there is no recorded  
17 assignment evidencing the transfer of the loan" because "[t]here is no requirement  
18 under California law for an assignment to be recorded in order for an assignee  
19 beneficiary to foreclose"). To the extent Plaintiff alleges the Note was simply never  
20 sold or transferred to U.S. Bank at all, his theory is too speculative to be plausible.  
21 Twombly, 550 U.S. at 555. Plaintiff's fallback position, that the Note was  
22 transferred to U.S. Bank, but the transfer occurred on September 5, 2012, after  
23 closing date for the 2007-S2 Trust, is an alleged violation of the PSA, a voidable  
24 defect that Plaintiff lacks standing to assert.

25 Plaintiff also challenges the validity of the Substitution of Trustee that  
26 substituted The Wolf Law Firm in place of First American Title Insurance Company  
27 as the trustee under the DOT. Most of his challenges, however, are based on the  
28 allegation that U.S. Bank was incapable of making the substitution, which, in turn,

1 relies on the same flawed theories regarding defects in the assignment of the DOT.  
2 To the extent Plaintiff objects that the substitution was signed by SPS as U.S.  
3 Bank's "servicing agent and attorney in fact" rather than by U.S. Bank itself, such  
4 a theory does not justify relief. Aceves v. U.S. Bank, N.A., 192 Cal. App. 4th 218,  
5 232 (2011) (rejecting plaintiff's foreclosure challenge based on the fact that the  
6 substitution of trustee was signed by the bank's attorney-in-fact because "[n]either  
7 Civil Code section 2934a, which governs the substitution of trustees, nor the trust  
8 deed itself precludes an attorney-in-fact from signing a Substitution of Trustee").

9 In sum, Plaintiff has not alleged an actionable flaw in the process leading to  
10 the foreclosure sale of his property. Because Plaintiff's causes of action for  
11 declaratory relief and wrongful foreclosure rely on these flawed theories, they will  
12 be dismissed for failure to state a claim.

13 B. Third Cause of Action for Violation of 15 U.S.C. § 1692e

14 Plaintiff's third cause of action for violation of the Fair Debt Collection  
15 Practices Act, 15 U.S.C. § 1692e, which prohibits the use of "any false, deceptive,  
16 or misleading representation or means in connection with the collection of any  
17 debt." 15 U.S.C. § 1692e. Plaintiff alleges SPS violated this provision by  
18 fraudulently representing to him that U.S. Bank held the beneficial interest on his  
19 Note, when in fact, in his view, the Note was never transferred to U.S. Bank. FAC  
20 ¶¶ 17, 19-23. Because this claim sounds in fraud, the heightened pleading  
21 standards of Rule 9(b) apply. See Vess v. Ciba-Geigy Corp. U.S.A., 317 F.3d  
22 1097, 1103-04 (9th Cir. 2003) (Rule 9(b) pleading standards apply where a claim  
23 is "grounded in fraud" or "sounds in fraud"). For the reasons discussed above,  
24 Plaintiff's allegation that the Note was never transferred to U.S. Bank is speculative  
25 and implausible and fails to meet the pleading requirements of Twombly and Iqbal,  
26 much less the heightened pleading standard for fraud. Twombly, 550 U.S. at 555.  
27 Accordingly, this claim will also be dismissed for failure to state a claim.

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1 C. Fourth Cause of Action for Violation of 15 U.S.C. § 1641(g)

2 Effective May 20, 2009, the Truth in Lending Act (“TILA”) was amended to  
3 add a requirement that purchasers of a mortgage loan must notify the borrower in  
4 writing of the transfer no later than 30 days after the loan is assigned. See 15  
5 U.S.C. § 1641(g). Plaintiff’s fourth cause of action is based on the allegation that  
6 if his Note was transferred to U.S. Bank, the transfer must have occurred on  
7 September 5, 2012, and U.S. Bank therefore violated § 1641(g) by failing to send  
8 him written notice. FAC ¶ 32.

9 Defendants argue that this claim should be dismissed for violation of the  
10 statute of limitations. A claim barred by the statute of limitations may be dismissed  
11 under Rule 12(b)(6) where the running of the statute is apparent on the face of the  
12 complaint. Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006).  
13 Claims under § 1641(g) are subject to the one-year limitations period in 15 U.S.C.  
14 § 1640(e). McQuinn v. Bank of America, N.A., 656 Fed. Appx. 848, 849 (9th Cir.  
15 2016) (mem. dispo.) “[T]he limitations period in Section 1640(e) runs from the date  
16 of consummation of the transaction but ... the doctrine of equitable tolling may, in  
17 the appropriate circumstances, suspend the limitations period until the borrower  
18 discovers or had reasonable opportunity to discover the fraud or nondisclosures  
19 that form the basis of the TILA action.” King v. State of Cal., 784 F.2d 910, 915  
20 (9th Cir. 1986). Plaintiff alleges the transfer occurred on September 5, 2012, but  
21 he did not file this action until May 19, 2016. Although TILA claims are subject to  
22 equitable tolling, Plaintiff has not alleged facts showing he did not learn about the  
23 transfer until within a year of filing the complaint. Accordingly, this claim will also  
24 be dismissed pursuant to Rule 12(b)(6).

25 D. Ninth Cause of Action for Breach of Contract and Tenth Cause of Action  
26 for Breach of the Implied Covenant of Good Faith and Fair Dealing

27 Plaintiff’s ninth and tenth claims for relief rely on an alternative theory, which  
28 is that if the Court finds that the assignment of the DOT to U.S. Bank was valid,

1 then U.S. Bank and SPS breached both the DOT and the implied covenant of good  
2 faith and fair dealing by improperly crediting his periodic loan payments.

3       These claims, too, are insufficiently pled. First, plaintiff's performance under  
4 the contract is a required element for a claim for breach of contract. Careau & Co.  
5 v. Security Pacific Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1389 (1990) ("Where  
6 contractual liability depends upon the satisfaction or performance of one or more  
7 conditions precedent, the allegation of such satisfaction or performance is an  
8 essential part of the cause of action."). Not only does Plaintiff fail to allege he  
9 performed his duties under the DOT, but he admits non-performance when he  
10 alleges he fell behind on his loan payments, and he fails to dispel this state of non-  
11 performance by, for example, alleging that he cured or even offered to cure his  
12 default under the terms of the DOT. Second, Plaintiff's claim for breach of the  
13 implied covenant of good faith and fair dealing falls short of the applicable pleading  
14 standard. Plaintiff alleges that "Defendants fraudulently concealed the fact that  
15 they were not applying payments in accordance with the [DOT]" and "concealed  
16 the improperly applied mortgage payments, the incorrect calculation of interest,  
17 and the improper fees...." FAC ¶ 84. His claim thus sounds in fraud and must  
18 satisfy the pleading requirements of Rule 9(b). Vess, 317 F.3d at 1103-04.  
19 However, his allegations are speculative and fall far short of the heightened  
20 standard for fraud.

21       Therefore, both causes of action will be dismissed for failure to state a claim.

#### 22       E. Remaining Causes of Action

23       Plaintiff's remaining causes of action for "quasi contract," negligence,  
24 violation of Cal. Bus. & Prof. Code § 17200, to quiet title, for accounting, and  
25 violation of Cal. Civ. Code §§ 2924.17 and 2924(a)(6), are based on the same  
26 alleged defects in assignment of the DOT and substitution of trustee discussed  
27 above. Because none of the allegations regarding these purported defects state  
28 a plausible claim for relief, Plaintiff's remaining causes of action likewise fail to

1 state a claim and will therefore be dismissed.

2 **V. CONCLUSION AND ORDER**

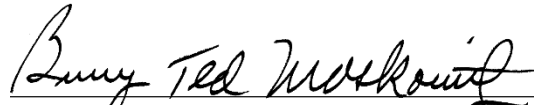
3 For the reasons discussed above, the Court GRANTS the motion to dismiss  
4 as to Defendants U.S. Bank, SPS, and JPMorgan Chase. The motion to strike is  
5 DENIED AS MOOT.

6 Plaintiff is granted leave to amend. Any amended complaint must be filed  
7 no later than September 15, 2017.

8 The Court notes that AMN defaulted on the original complaint on September  
9 6, 2016. Pursuant to Local Civil Rule 55.1, plaintiffs are required to move for  
10 default judgment within thirty (30) days of the entry of a default, or an order to show  
11 cause will be issued why the complaint against the defaulted party should not be  
12 dismissed. CivLR 55.1. An order to show cause why AMN should not be  
13 dismissed will be issued separately.

14 IT IS SO ORDERED:

15 Dated: August 18, 2017

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17 Barry Ted Moskowitz, Chief Judge  
18 United States District Court  
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